



As discussed below, the Tennessee Court of Appeals has repeatedly affirmed that confidential information, such as trade secrets, which is protected by state law, is exempt from the mandatory disclosure requirements of TOPRA. In light of this law, Atmos proposes that the Authority consider adopting a rule similar to Georgia Public Service Commission Rule 515-3-1-.11 (attached hereto as Exhibit 1), which provides a procedure to protect the confidentiality of information submitted to the agency.

**II. TOPRA CONTAINS AN EXCEPTION FOR INFORMATION, SUCH AS TRADE SECRETS, WHICH IS PROTECTED BY STATE LAW.**

The vast majority of information the TRA receives would fit the definition of a public record, and therefore fall within the scope of TOPRA. As such, unless the information falls within an exception to the public disclosure requirements of TOPRA, the TRA likely lacks the authority to maintain the confidentiality of such information. The opinion of the Tennessee Court of Appeals in its recent decision in Swift v. Campbell, 159 S.W.3d 565 (Tenn. Ct. App. 2004), *perm. app. denied* Aug. 25, 2004, contains a detailed discussion of the scope, purpose, and application of TOPRA. In that opinion, the Court noted that consistent with the legislative intent to promote public awareness of government actions, TOPRA requires that all "public records," which are defined to include virtually all printed matter created or received by government in its official capacity, be made available to the public upon request. Swift, 159 S.W.3d at 571. However, TOPRA has, since its inception, excepted certain types of information from the disclosure requirements. As the Court in Swift recognized, included among those exceptions is a general exception for information, such as trade secrets, protected from disclosure by other provisions of state law:

Notwithstanding the breadth of the public records statutes' disclosure requirements, the General Assembly recognized from

the outset that circumstances could arise where the reasons not to disclose a particular record or class of records would outweigh the policy favoring public disclosure. Accordingly, the General Assembly provided two types of exceptions from disclosure under the public records statutes. First, the General Assembly included specific exceptions from disclosure in the public records statutes themselves. Second, it acknowledged and validated both explicit and implicit exceptions from disclosure found elsewhere in state law.

Swift, 159 S.W.3d at 571. The general exception for information protected by other provisions of state law is codified in Tenn. Code Ann. § 10-7-503(a), which provides, in relevant part, that

all state, county and municipal records and all records maintained by the Tennessee performing arts center management corporation, except any public documents authorized to be destroyed by the county public records commission in accordance with § 10-7-404, shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, *unless otherwise provided by state law.*

(emphasis added).<sup>1</sup> Therefore, when determining whether a particular document must be disclosed under TOPRA, the courts' "role is to determine whether state law either explicitly or implicitly excepts particular records or a class of records from disclosure...." Swift, 159 S.W.3d at 572. Tennessee courts have repeatedly affirmed the proposition that the exceptions from TOPRA's disclosure requirements are not limited to the enumerated categories found in the Act itself, but include exceptions arising from various other provisions of state law. See, e.g., Eldridge v. Putnam County, 86 S.W.3d 572, 575 (Tenn. Ct. App. 2001) (noting that could be exempt from disclosure under state statutes, the Rules of Civil Procedure, or common law);

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<sup>1</sup> As the Swift Court pointed out, the original version of TOPRA excepted from disclosure government documents whose confidentiality was "provided by law or regulations made thereto." Swift, 159 S.W.3d at 571. In 1984, the legislature narrowed this exception to apply only to records made confidential by "state statute." Id. In 1991, the legislature returned the exception to a broader scope by replacing "state statute" with "state law." Id. As the Court recognized in Swift, this change "broadened the permissible sources of exceptions from disclosure to include not only statutes, but also the Constitution of Tennessee, the common law, the rules of court, and

Coats v. Smyrna/Rutherford County Airport Authority, 2001 WL 1589117 at \*4 (Tenn. Ct. App. Dec. 13, 2001) (holding that TOPRA's general exception "qualifies the presumption of openness by creating a general exception for other state laws protecting documents," which would include the Canons of Professional Conduct adopted in Supreme Court Rule 8); Arnold v. City of Chattanooga, 19 S.W.3d 779, 785 (Tenn. Ct. App. 1999) (upholding exception under Tenn. R. Civ. P. 26 work product doctrine, and noting that past cases decided under TOPRA's general exception "make clear that courts will find exceptions to the Public Records Act apart from those specifically set forth therein," and that "[s]pecifically, the Court will look to the Rules of Civil Procedure and the Common Law for such exceptions."); Ballard v. Herzke, 924 S.W.2d 652, 662 (Tenn. 1996) (holding that information subject to a protective order entered pursuant to Tenn. R. Civ. P. 26 was exempt from disclosure under TOPRA's general exception); Seaton v. Johnson, 898 S.W.2d 232, 236 (Tenn. Ct. App. 1995) (holding that federal confidentiality requirements governing railroad crossing safety information fell within TOPRA's general exception); Appman v. Worthington, 746 S.W. 2d 165, 167 (Tenn. 1987) (holding that the Tennessee Rules of Criminal Procedure fell within TOPRA's general exception).

Many petitioners requesting access to public records have argued that the Court's opinion in Memphis Publishing Co. v. Holt, 710 S.W.2d 513 (Tenn. 1986), limits TOPRA's exceptions to those enumerated in the statute. That argument has been consistently rejected as a misinterpretation of the Holt opinion. As subsequent opinions have recognized, in Holt, the court's refusal to exempt the investigative records at issue from disclosure was not based exclusively on the fact that there was no specific exception for such records within TOPRA

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administrative rules and regulations because each of these has the force and effect of law in Tennessee." Id. (internal citations omitted)

itself, but also on the court's specific finding that such records were not otherwise exempted by state law, and therefore not within the general exception. See The Tennessean v. City of Lebanon, 2004 WL 290705 at \*8 (Tenn. Ct. App. Feb. 13, 2004) (discussing the holding in the Holt case). In Holt, the city requested that the court create a public policy exception to TOPRA, an argument the court rejected. Id. The Holt decision did nothing to remove or limit the application of TOPRA's general exception for documents protected by statute, rules, or common law.

These cases make it clear that the TRA may adopt a procedural rule protecting the confidentiality of information submitted in non-contested cases, without violating TOPRA, as long as the information is protected by other provisions of state law. As discussed in the following section, there can be no question but that trade secrets are protected under state law.

### **III. THE TRA HAS AN OBLIGATION TO PROTECT THE CONFIDENTIALITY OF TRADE SECRET INFORMATION.**

Both Georgia and Tennessee have adopted the Uniform Trade Secrets Act, which protects against disclosure of trade secrets. A trade secret is defined as follows:

Trade secret means information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and


(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tenn. Code Ann. § 47-25-1702(4). Much, if not all, of the filings Atmos has and will seek to protect would fall within the definition of trade secrets. The Tennessee Trade Secrets Act

prohibits "misappropriation" of trade secrets, which is defined to include disclosure of trade secrets by persons (defined to include government agencies) with a duty to maintain confidentiality. Tenn. Code Ann. § 47-25-1702. Under these definitions, arguably, once the TRA is informed that information being submitted is trade secrets, the Authority could be deemed liable for misappropriation if it refused to protect the confidentiality of such information.

By enacting a procedural rule similar to the Georgia rule submitted herewith, which includes a procedure allowing individuals to contest the designation of material as a trade secret, the TRA would comply with both the general duty to maintain the confidentiality of trade secret information, and with its obligations under TOPRA. As such, Atmos respectfully requests that the TRA consider adoption of such a rule.

BAKER, DONELSON, BEARMAN  
CALDWELL & BERKOWITZ



Joe A. Conner, TN BPR # 12031  
Misty Smith Kelley, TN BPR # 19450  
1800 Republic Centre  
633 Chestnut Street  
Chattanooga, TN 37450-1800  
(423) 209-4148  
(423) 752-9549  
mkelley@bakerdonelson.com  
Attorneys for Atmos Energy Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, postage prepaid, to the following parties of interest this 1st day of July, 2005.

Richard Collier  
General Counsel, Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243-0505

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LAW OFFICES  
**BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ**  
A PROFESSIONAL CORPORATION  
1800 REPUBLIC CENTRE • 633 CHESTNUT STREET  
**CHATTANOOGA, TENNESSEE 37450**

(+23) 756-2010

Facsimile  
(+23) 756-3447

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